SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1949

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

WILLIAM I. CONNELLY and BERTHA CONNELLY,

REPLY TO PETITION FOR WRIT OF CERTIORARI.

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WILLIAM J. CONNELLY and BERTHA CONNELLY.

REPLY TO PETITION FOR WRIT OF CERTIORARI.

OPENING STATEMENT.

Stripped of its innuendoes, unbecoming and unjustified criticism of the United States Court of Appeals for the District of Columbia Circuit, and incomplete statements of fact, the petition for certiorari falls far short of stating a case in which this Honorable Court should exercise its discretion to grant a writ of certiorari and re-examine the well considered opinion of the Court below. For the reasons hereinafter set forth, the respondent contends that the United States Court of Appeals for the District of Columbia very properly differentiated the case at bar from the decision of this Court in the case of *Mitchell* v. *Cohen*, 333 U. S. 411, the petitioner to the contrary notwithstanding.

FACTS NOT SHOWN IN PETITION FOR WRIT OF CERTIORARI.

The taxing statute involved, (Sec. 22b (13) (A)) of the Internal Revenue Code, allowed an exclusion of $1,500 from the compensation received by a *commissioned officer* for *active service* in the military or naval forces during World War II. The two important requirements, accordingly, are that the taxpayer must have been (1) on active service and (2) he must have been a commissioned officer. There is nothing in the taxing statute limiting the right to the exclusion based on the source of his compensation, notwithstanding petitioner's argument that the agency of the Government which pays the salary of the officer determines his status.

Petitioner repeatedly has stressed and labored certain factors which tend to make taxpayer look like a civilian. The following additional facts, however, are in the record but not found in the petition for certiorari, and it is believed that these unmentioned facts plus the law of the case conclusively place the taxpayer in the class entitled to the exclusion as provided in the tax law.

1. Taxpayer was enrolled not only as a temporary member of the United States Coast Guard Reserve but also as a *commissioned officer* thereof with the rank of lieutenant commander (R. 35) and later commander, from February 19, 1943, through September 15, 1945.

2. Taxpayer was assigned to full-time, active special duties at Coast Guard Headquarters, (R. 16, 17, 18)

3. As said commissioned officer, taxpayer was entitled to receive, among other things

a. Ship Service Stores	(R. 27)
b. Traveling privilege	"
c. Officers' Mess and Wine Mess	"
d. War ballott	(R. 28)
e. Badge and medals	(R. 26, 27)
f. Military etiquette and courtesies	(R. 26)
g. Burial in Arlington	"

4. Taxpayer had the *all* authority, title, duties and obligations of a commissioned officer by congressional statute, and he was sworn in as such by congressional authority.

5. Taxpayer was required to be in uniform at all times and was subject to orders 24 hours per-day (R. 37, 38)

6. Taxpayer was subject to disciplinary action if he traveled more than 50 miles away from Coast Guard Headquarters without written permission of his commanding officer. (R. 38)

In addition to the above, the taxpayer was fully subject to the Articles for the Government of the Navy, to military discipline, including court martial, and had to obey all lawful orders from superiors, 14, U. S. C. A. Sec. 309, 310.

INACCURATE STATEMENTS IN PETITION.

There are two inaccuracies in the petition to which attention is respectfully invited:

On page 3, a statement is made that

> "by the terms of his enrollment, the taxpayer was to receive no pay or allowances other than the compensation of his civilian position which he continued to hold, and his duties were to be performed in the classification known as 'Coast Guard Civil Service Employees'" (R. 16 * * *).

It should be carefully borne in mind that the quoted statement applied *not* to the respondent's *original* enrollment, but to the document which was furnished him over a year later when he was promoted to the rank of Commander.

At page 4, it is stated

> "* * * apparently, his disenrollment could be secured at his own convenience, as well as on the initiative of the Coast Guard".

It will have been noted that the taxpayer was disenrolled on September 15, 1945—after the termination of active hos-

tilities" and the original phrasing of the separation document referring to the taxpayer's "own convenience" was revised to show that the reason for disenrollment was "completion of service because of satisfactory completion of assigned duties". (R. 84)

ARGUMENT.

The writ should be denied because:

1. There is No Question of General Importance Present in This Case.

The group represented by this taxpayer was expressly recognized by the decision of this Court in *Mitchell v. Cohen*, 333 U. S. 411, 414 (see footnote 8, group 5) and is one of the smallest of the numerous classes of individuals who were brought into the Coast Guard Reserve as an incident of the war.

In the opening pages of the record before the Tax Court, the following statement appears:

> "I would like to state here if I may, Your Honor, that this is one of approximately 300 similar cases. There were approximately 300 professional and technical people who were then in the Coast Guard and were taken into the Reserve and who continued, as I explained, to receive the compensation of the position they held when taken in."

Because of the unnecessary prolongation of this litigation due to the disinclination of the petitioner to move the case to a final determination in the Court below, and the running of the three-year statute of limitations provided by 26 U. S. C. 322(b), it is believed that not more than one hundred persons in this group who have been kept informed of the progress of this case and have preserved their rights, will be affected by the decision of the United States Court of Appeals for the District of Columbia Circuit for the tax years in question, namely, 1943, 1944, 1945, and, in part, 1946.

2. There is No Question of Substance Relating to the Construction or Application of the Constitution or Statutes of the United States Which Has Not Been and Should be Settled by This Court.

The Veterans Preference Act of 1944, 58 Stat. 387, 5 U. S. C., Sec. 851, on which the entire controversy in *Mitchell* v. *Cohen* turned, is not involved, has not been invoked, and can have no bearing upon the decision in this case. The sole question in the case at bar is the interpretation of Section 22 (b)(B)(A) of the Internal Revenue Act and its effect upon the respondent and some hundred, or less, other persons whose present situation is similar to his. The respondent wishes to emphasize that there are not 70,000 people to be affected by the decision in this case, as there was in *Mitchell* v. *Cohen* and the income of the respondent and the people similarly situated, can be reliably estimated at less than $6000 with very few exceptions.

Respondents urge that refusal to grant the writ will not work any hardship upon the United States as represented by the Commissioner of Internal Revenue, as the subject is one which does not require an adjudication by this Court.

After the War was over, Congress repealed so much of the section of the statute as allowed the Commandant to enroll government employees like respondent. Unless a similar emergency arises comparable to that which existed in 1942, and unless the Coast Guard again wants to utilize the services of its civilian personnel under an identical formula, no similar tax situation can arise. Such an identical set of circumstances is improbable to the point of impossibility.

3. The United States Court of Appeals for the District of Columbia Circuit Has Given Proper Effect to an Applicable Decision of This Court in Disposing of the Case at Bar.

The Court of Appeals for the District of Columbia Circuit has not, as contended by petitioner, relied on its own opinion in *Mitchell v. Cohen*, 160 F. 2d. 915, in disregard of the reversal of that case by this Court. Early in the argument before the Court below, the question arose respecting the applicability of *Mitchell v. Cohen* to this case, and the distinction between the *Mitchell* case and this was readily discerned by the Court. The opinion of the Court of Appeals in the case at bar refers to the decision of this Court in the *Mitchell* case and accepts the definition of "ex-serviceman" insofar as the Veterans' Preference Act of 1944 was intended to apply to temporary members of the Coast Guard Reserve serving as participants in the *Port Security* program. But the Court of Appeals very properly distinguished the *Mitchell* case from this case upon a standard which had been recited in the appellate court opinion in the *Mitchell* case which has not been questioned or rejected by this Court upon review.

The Court of Appeals has said,

> "* * * we adhere to those views for purposes *other than that statute*."

which is substantially the language employed by this Court at page 321 of its opinion in the *Mitchell* case.

The controversy here raises the question as to whether the taxpayer had a civilian status or a military status during World War II. The petitioner ties military pay with military services and argues that if the pay is from a civilian government payroll, then military status is lacking. The United States Court of Appeals for the District of Columbia Circuit, in dealing with this point, stated:

> "The second feature which gives rise to the dispute, is the nature of petitioner's pay. He was on full-

> time active service, and he was compensated. But the Commissioner points to that part of the Coast Guard Auxiliary and Reserve Act (Sec. 207, *supra* note 7) which referred to the enrollment of 'Government employees without pay other than the compensation of their civilian positions'. He argues that petitioner, being in that category, did not receive 'military pay'. The revenue act does not use that term. Its term is 'compensation . . . for active service'. To reach the conclusion that petitioner's compensation was not for service in the naval forces we would have to hold that he worked full time for no compensation while, at the same time, he received full compensation for no work. The facts are that he was engaged in full-time active duty in the naval forces, and he received compensation. We think he received the compensation for the work."

Taxpayer believes that logic and reason support the above conclusion. In *Mitchell* v. *Cohen*, *supra*, the temporary members of the Coast Guard Reserve involved performed part-time duties only without compensation and without interruption to their regular employment. The Veterans Preference Act of 1944 established preference in government employment for "ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States". In construing the term "ex-servicemen", this Court stated that the word applied "to those who performed military service on full-time active duty with military pay and allowances, thereby dislocating the fabric of their normal economic and social life". It cannot be denied that in the instant matter the respondent was a commissioned officer as a temporary member of the Coast Guard Reserve. He was on full-time active duty, and the fabric of his normal economic and social life was disrupted. The fact that his compensation came from an appropriation allocated to a civilian position is not material under the terms of the taxing statute, and as far as taxpayer was concerned, he could not have been any more in the military service than he was even had he been paid from so-called military appropriations.

The particular facts with respect to this taxpayer are that as the result of many years work for the Government as a civil service employee, he was a specialist in admiralty law and the legal aspects of maritime matters generally. On March 1, 1942, as a war measure (Executive Order 9083, February 28, 1942) he was transferred with a number of other persons from the Department of Commerce to the United States Coast Guard.

In January 1943, he was asked to consider enrollment as a temporary member of the Coast Guard Reserve which had been established by Act of Congress of February 19, 1941 (14 U. S. C. A. 301, et seq., 56 Stat. 1021) but he declined to take any steps at that time towards that end. (R. p. 36) Later he reconsidered and filed the necessary application (R. p. 36), realizing that his specialized knowledge and experience would undoubtedly be useful to the Coast Guard in the war effort, although he was not eligible for general sea duty because of his age of 49 years.

Thereupon, at five o'clock on the afternoon of February 19, 1943, he was sworn in and took the prescribed oath of office as an officer of the Coast Guard. (R. p. 35) On that date he was given the rank of Lieutenant Commander and assigned full-time, active, special duties at Coast Guard Headquarters and informed that such uniforms as might be required would be furnished him. (R. p. 17) He signed the formal acceptance of enrollment as Lieutenant Commander and the written oath of office.

He was disenrolled as Lieutenant Commander and immediately reenrolled as Commander on April 24, 1944, (effective for pay purposes March 15, 1944).

This taxpayer maintains that *by virtue of the terms of the Coast Guard Reserve Act his status as a commissioned officer attached at the time of his enrollment on February 19, 1943, and continued until his disenrollment, under honorable conditions after satisfactory service, on September 15, 1945.*

It is the *status* of the taxpayer which is the question primarily in issue. Once he had gone through with the ceremony prescribed by the Coast Guard, taxpayer was in *a military status*, by virtue of the *law* under which he was enrolled. Pronouncements by taxing authorities and others to the effect the appellant was really "a civilian dressed up to look like an officer" are of no avail or meaning insofar as they deny his military status, since it is the *law* that fixed and controlled his status once he had taken the oath.

The Tax Court, in its decision, and the petitioner, have fallen into error by not properly differentiating between "status" and "rank" or between "status" and "duties." Under Sec. 307 of the Coast Guard Reserve Act the Commandant could change a man's *status* from a civilian to military, confer on him any rank between apprentice seaman and captain and assign him to whatever duties he, the Commandant, might prescribe. On February 19, 1943, the Commandant *did change* taxpayer's *status from* civil service to military service when the oath was administered and simultaneously conferred on the petitioner the *rank* of Lieutenant Commander and assigned him to full-time, active, special *duty*.

There is only one Coast Guard Reserve and it is composed of regular and temporary members. (Stip. R. 15) Under Sec. 204, Title II of the Coast Guard Auxiliary and Reserve Act of 1941 (55 Stat. 11), it is provided that

> "The Reserve shall be a *military organization* administered by the Commandmant", *etc.*

The enrollment by taxpayer as a commissioned officer did have a definitely restricted effect upon his civilian life. The disruption in such regard is shown in the record as follows (R. p. 38):

> "Q. After you took the oath of office as a temporary reservist, how was your life as a civilian affected? A. Well, before I took the oath of office I was required to report for duty in the morning at eight o'clock and at 4:30 in the evening I was through, if I so chose. After

I took the oath of office I learned that I was under the complete control and authority of the Coast Guard for 24 hours a day, that my orders so stipulated.

"I would require a written permission from my commanding officer before I could leave the base and go to a distance of more than 50 miles, without being exposed to the risk of arrest by the shore patrol or other authority.

"If I happened to have two or more guests at my home I was required to don the regulation uniform and wear it at all times, and by that I mean that the regulation uniform as worn in my home had to conform in all respect to the regulations. Nothing of informality was attached to that wearing of the uniform.

"I was required to exchange the customary courtesies of salute when the salute was tendered to me or when under certain circumstances I should initiate it as being the junior officer.

"If by any chance I was indisposed, could not report to duty, instead of calling up my secretary and having her put me on the sick list, I had to report through the duty officer of the Coast Guard, and that duty officer would make the necessary report not only to my commanding officer and the chief counsel, but also any other reports that were necessary to be made.

"Q. In other words, there was a direct impact of considerable consequence on your civilian life? A. There was a direct impact in the sense that in any transgressions I might indulge I was subject to all the Navy regulations as respects discipline, and that could, under appropriate circumstances, amount to a general Court Martial.

"Q. And were you addressed as 'Commander,' as were other officers of your status? A. Yes."

4. The United States Court of Appeals for the District of Columbia Circuit Has Not Decided a Federal Question in a Manner Conflicting with Any Applicable Decision of This Court.

Since neither this Court, nor, (so far as is known), any other Court, has had the identical problem presented, namely, the application of the Internal Revenue Act to the income of temporary members of the Coast Guard Reserve *on full-time active duty*, it is abundantly clear that the Court of Appeals has not deviated from what this Honorable Court stated was the law of the case in *Mitchell* v. *Cohen*. On the contrary, the Court of Appeals has meticulously followed that decision, and has very properly discovered a clear distinction between *Mitchell* v. *Cohen*, and *Connelly* v. *Commissioner*.

5. The Action Taken by the United States Court of Appeals for the District of Columbia Circuit is Not Such as to Require Reexamination by This Court.

The criticism of the Court below in the petitioner's brief is as unfair as it is unwarranted. The lower Court gave due recognition to the decision of this Court in the *Mitchell* case, and quickly found the distinguishing factors between the two cases and applied the reasoning of this Court to its determination of the case at bar. The dissenting Judge in the Court below gave no reason for his action beyond a simple statement that the holding of the *Mitchell* case was determinative of this case, yet it is quite apparent from his opinion that he gave no weight whatever to the fact that the taxpayer here was on *full-time active duty* in the Coast Guard Reserve, and as such was subject at *all* times to the authority of the Coast Guard for disciplinary purposes, and at *all* times carried the responsibility and authority of other persons of similar rank in the regular Coast Guard, the Coast Guard Reserve, and the Coast Guard Women's Reserve.

As above shown, a person performing full-time active duty is subject to the dislocation of the fabric of a normal economic and social life, and in the case at bar it should be remembered that the benefit claimed by the taxpayer *was asserted during the period of his active service as an officer in the Coast Guard Reserve on full-time active duty.*

Attention is invited to the fact that Section 22(b) (13) of the Internal Revenue Act in effect when the taxpayer filed his return in 1944 *made no distinction between commissioned officers and persons below the rank of commissioned officers*, but extended the right to the exclusion to all members of the military or naval forces of the United States regardless of rank for active service in such forces during the war—"so much of such compensation as does not exceed $1,500." The law was amended in 1945 to segregate the commissioned officers who were still entitled to deduct the $1,500 exclusion, but completely immunized persons below the rank of commissioned officer from Federal taxation in the years of their service during the war. Thus it was always a question of *status* rather than *rank* which determined the right to the exclusion.

In summary, it is fair to say it was with his expert and specialized qualifications for the good of the service, in its prosecution of the war, to have the taxpayer placed in a military status. If the United States Coast Guard had found it more advantageous to retain him in a civilian capacity, it would have done so. However, a change to a military status obviously was deemed essential for the proper discharge of the military work of the United States Coast Guard.

The attitude of the Coast Guard was officially voiced by its Commandant in his Office Memorandum No. 13-43 (R. 64) wherein he said in part:

> "4. It is directed that hereafter temporary members of the Reserve while in the execution of their official duties at Coast Guard Headquarters, occupy the same place in the scheme of Headquarters organization as members of the regular Coast Guard and the regular

Reserve. They shall exercise military authority and accept military responsibility within the scope of their active duty functions, in accordance with the terms of their temporary enrollment, with regard to conditions of service, authority, powers, duties, periods of active duty, etc.

"6. The attention of heads of offices and chiefs of divisions is invited to the fact that one of the principal reasons for the induction of civil service employees into the military establishment as temporary members of the Reserve was to obtain a homogeneous organization on a military basis, and to eliminate differences in procedure and practices applicable to military personnel and civil service personnel engaged on exactly the same duty; and this memorandum is issued in order to effectuate that policy."

A denial of the tax exclusion, therefore, makes for unfair and demoralizing treatment to the taxpayer and other officers, who gave just as much of their time and energy to the service as the regularly officers of the United States Coast Guard stationed at Coast Guard Headquarters. This situation poses the categorical question should not this taxpayer be entitled to take the tax exclusion the same as the so-called "regular" occupying the desk next to him, doing the same kind of work. Surely, they were on the same economic level, and surely the war had a similar effect on their income and resources. There appears to be no justification for any differentiation between them on questions of tax liability.

CONCLUSION.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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